NO. 77-453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

EASTEX, INCORPORATED
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above captioned case on April 29, 1977.

OPINIONS BELOW

The decision of the Administrative Law Judge of the National Labor Relations Board is reported at 215 NLRB 271 and appears in the Appendix at pages 4a-23a. The decision and order of the National Labor Relations Board is reported at 215 NLRB 271 and appears in the

Appendix at pages 24a-25a. The opinion of the Fifth Circuit Court of Appeals is reported at 550 F.2d 198, and appears in the Appendix at pages 26a-42a. The judgment of the Court of Appeals appears in the Appendix at page 43a. The decision of the Fifth Circuit denying Petitioner's motion for rehearing and motion for rehearing *en banc* appears in the Appendix at pages 44a-47a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 29, 1977 (Appendix p. 43a). A timely petition for rehearing was denied on August 5, 1977 (Appendix p. 47a). Mandate was stayed to and including September 23, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Section 10(f) of the National Labor Relations Act, 29 U.S.C. §160(f).

QUESTIONS PRESENTED

1. Whether the "mutual aid or protection" language of Section 7 of the National Labor Relations Act grants protection to distribution, by employees on their employer's property, of writings or other materials containing subject matter which is political in nature or is not closely related to the employees' immediate employment relationship?

2. Whether Section 7 grants protection to the distribution by employees on an employer's premises of any material having a subject matter "reasonably related" to the employees' jobs, status, or condition as employees?

3. Whether the interference with an employer's property rights which results from application of the "reasonable relation" standard used by the court below is completely out of proportion to the nature and strength of the Section 7 rights to be protected?

4. Whether the initial "balancing and accommodation" of employees' Section 7 rights and employer private property rights should have been made by the National Labor Relations Board rather than by the Court of Appeals?

5. Whether the "accommodation" and "balance" made by the Court of Appeals in applying its "reasonable relation" standard reflects an appropriate recognition of an employer's property rights?

STATUTES INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. §157, reads in pertinent part as follows:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) reads as follows:

> "It shall be an unfair labor practice for an employer—
>
> "(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in § 157 of this title."

STATEMENT OF THE CASE

This is an action to review a final order of the National Labor Relations Board ("Board") wherein the Board determined that Eastex, Incorporated ("Petitioner") violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §158(a)(1), ("Act") by prohibiting distribution of a union-sponsored circular by employees on Petitioner's premises.

This case arose out of a decision by the Personnel Director of Petitioner denying permission to employee members of the United Paperworkers International Union, Local 801 ("Union") to distribute a union circular on Petitioner's plant premises because Sections 2 and 3 of the circular were considered to have no relevance to any matter concerning Petitioner's relations with its employees, and were political in nature. Petitioner had no objection to the distribution on plant premises of Sections 1 and 4 of the circular. (The complete contents of the circular appear in the Appendix at pages 1a-3a.) Section 2 of the circular, "A Phony Label—right to work", consisted of an argument against inclusion by a Texas constitutional convention of a "right to work" provision in a proposed revised constitution.[1] Section 3 of the circular, "Politics and Inflation", contained criticism of then President Nixon for his veto of H.R. 7935, a minimum wage bill, and comments about oil industry profits.

As a result of Petitioner's refusal to allow distribution of Sections 2 and 3, Union filed an unfair labor practice charge with the Board on May 2, 1974, alleging violation of the Act. An amended charge was filed on June 4,

1. Texas has been a "right to work" state continuously since 1947. See Tex. Rev. Civ. Stat. Ann. Art. 5154g, § 1.

1974. The Board issued a complaint on June 4, 1974, alleging violations of Section 8(a)(1) of the Act through Petitioner's refusal to allow distribution of the circular and its retention of no-solicitation and no-posting rules.

An Administrative Law Judge held that prohibiting distribution of the entire circular on plant premises was a violation of Section 8(a)(1) of the Act.[2] (Appendix pp. 4a-23a) On December 4, 1974 a three-member panel of the Board rendered a decision and order affirming the rulings, findings and conclusions of the Administrative Judge, and adopted his recommended order. (Appendix pp. 24a-25a)

On Appeal under Section 10(f) of the Act, the court below affirmed.[3] The court held that the "mutual aid or protection" clause of Section 7 extends to cover distribution on plant premises of "whatever is reasonably related to the employees' *jobs* or to their status or condition as employees in the plant", and included Sections 2 and 3 of the Union circular within the compass of such protection. The court rejected Circuit authority from the Fourth, Sixth, Seventh and Ninth Circuits which more narrowly limits the scope of Section 7 protection. On petition for rehearing and petition for rehearing *en banc*, the court below deleted all references to the First Amendment which were contained in its original opinion. Rehearing was denied.

2. The Administrative Law Judge also found that Petitioner maintained a no-solicitation rule in violation of § 8(a)(1) of the Act. Petitioner does not challenge the Administrative Law Judge's order as to the rule, nor did this rule play any role in Petitioner's decision to prohibit distribution of the union circular. The rule is not in issue here. A no-posting rule was upheld. If distribution of the circular was not protected, the presence or absence of a no-solicitation rule would have no effect.

3. Reported at 550 F.2d 198 (5th Cir. 1977). (Appendix pp. 26a-42a).

REASONS FOR GRANTING THE WRIT

I.

The decision of the court below is in conflict with decisions of four other Circuit Courts of Appeal—the Fourth, Sixth, Seventh, and Ninth.[4] This conflict was conceded by the Fifth Circuit in its opinion, which also invited resolution of the conflict by this Court. 550 F.2d 198, 202 (Appendix p. 34a). There is authority in the First, Second and Ninth Circuit Courts of Appeal which lends some nominal support to the Fifth Circuit's rationale.[5] The conflict among (and within) the Circuits revolves around the scope of the activity protected by the "other mutual aid or protection" language of Section 7 of the Act. The majority of Circuit Courts have taken the same position as Petitioner: activity is protected as "other mutual aid or protection" only if it concerns matters which are intimately connected to the employees' immediate employment or over which the employer has control, or requests action on the part of the employer.[6]

---

4. See note 6, infra. Although the court below relied upon *Kaiser Engineers v. NLRB*, 538 F.2d 1379 (9th Cir. 1976), *Kaiser* is itself in conflict with two other Ninth Circuit decisions: *Shelly & Anderson Furniture Mfg. Co. v. NLRB*, 497 F.2d 1200 (9th Cir. 1974), and *Tanner Motor Livery, Ltd. v. NLRB*, 419 F.2d 216 (9th Cir. 1969). *Kaiser* was a 2-1 decision authored by District Court Judge Sweigert which did not overrule such other decisions, and did not involve employer property rights. Consequently, Petitioner asserts that *Kaiser* does not dislodge *Shelly & Anderson* and *Tanner Livery* as representative of the mainstream of Ninth Circuit authority. See 538 F.2d 1379, 1386-87 (Dissent of Kennedy, J.).

5. See *NLRB v. Peter Cailler Kohler Swiss Chocolate Co.*, 130 F.2d 503 (2nd Cir. 1942); *Bethlehem Shipbuilding Corp. v. NLRB*, 114 F.2d 930 (1st Cir. 1940); *cert. denied*, 312 U.S. 710 (1941); *Kaiser Engineers v. NLRB, supra.*

6. See *NLRB v. Leslie Metal Arts Co., Inc.*, 509 F.2d 811, 813 (6th Cir. 1975), ("Protected activity must in some fashion involve employees' relations with their employer. * * *"); *Shelly & Anderson Furniture Mfg. Co. v. NLRB*, 497 F.2d 1200 (9th Cir. 1974), (Protected activity must seek a specific remedy for a work-related complaint or grievance); *NLRB v. Tanner Motor Livery Ltd.*, 419 F.2d 216 (9th Cir. 1969), (the mutual aid clause of Section 7 "protects concerted activities which have to do with terms and conditions of employment"); *G & W Electric Speciality Co. v. NLRB*, 360 F.2d 873 (7th Cir. 1966), (when the activity of the employee does not involve a request for any action on the part of the company or does not concern a matter over which the company has any control such action is not within the other mutual aid or protection of 29 U.S.C.A. § 157); *NLRB v. Bretz Fuel Co.*, 210 F.2d 392, 396 (4th Cir. 1954), ("Concerted activity is protected only where such activity is intimately connected with the employees' immediate employment").

The position of the Fifth Circuit echoes that taken by the majority in *Kaiser Engineers, supra,* in the *Ninth* Circuit.[7] The Fifth Circuit held that any matter "reasonably related to the employees' *jobs* or to their status or condition as employees in the plant may be the subject" of handouts distributed on the plant premises. 550 F.2d 198, 202 (Appendix p. 36a). This standard and the interpretation of it by the court directly conflicts with *Shelly & Anderson* (Ninth), *G & W Electric* (Seventh), *Leslie Metal Arts* (Sixth) and *Bretz Fuel* (Fourth).[8]

The conflict is clear through comparison with *Bretz Fuel.* In *Bretz Fuel* the miner-employees demonstrated in opposition to a "Fire Boss" bill in the legislature. Although the passage of the legislation would have had an effect in the mines, the court held that the protest was unprotected activity because the subject matter was not "intimately connected with the employees' immediate employment". 210 F.2d at 396. In the instant case, the union sought to distribute polemics regarding a Presidential veto of a

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7. See note 4, *supra.*

8. See note 6, *supra.*

minimum-wage bill, oil industry profits, and a proposed constitutional provision before the Texas constitutional convention incorporating Texas' existing "right-to-work" statute. Neither matter was intimately connected with immediate employment as the court below recognized.[9]

The Ninth Circuit in *Shelly & Anderson Furniture Mfg. Co. v. NLRB*, 497 F.2d 1200 (9th Cir. 1974) declared that an activity must satisfy four elements to qualify for Section 7 protection:

> "1) there must be a work-related complaint or grievance;
> 2) the concerted activity must further some group interest;
> 3) a specific remedy or result must be sought through such activity;
> 4) the activity should not be unlawful or otherwise improper." 497 F.2d at 1202-3.

The material in the instant case wholly fails to satisfy the first or third elements of *Shelly & Anderson Furniture Mfg. Co.*

The Seventh Circuit in *G & W Electric Specialty Co. v. NLRB*, 360 F.2d 873 (7th Cir. 1966) *expressly rejected* the "reasonable relation" or connection test employed by the Fifth Circuit.

> "The Board's decision expresses the view that the ambit of §7 . . . extends to the type of indirectly-related activity . . . (which) . . . bears such a *reasonable* connection to matters affecting

9. Petitioner also asserts that the material was not even "reasonably related" to the employees' jobs or status as Petitioner's employees. See discussion, *infra*.

> the interests of employees *qua* employees as to come within the general reach of the 'mutual aid and protection' the statute is concerned to protect.
>
> " . . . Here the activity involved no request for any action upon the part of the Company and did not concern a matter over which the Company had control. . . . It was not an interest derived from their status as company employees or bearing any significant connection to their employment relationship with the Company.
>
> "The sweep of the broad interpretation inherent in the Board's application of the 'or other mutual aid or protection' clause to the facts of the instant case gives to that clause a meaning and effect which in our opinion is out of harmony with the immediate context in which the clause appears and which transcends the subject matter the Act is designed to embrace—labor-management relations.
>
> "The range of possible employee mutual interests apart from those which bear a reasonably significant impact upon working conditions or some material incident of the employment relationship is in our opinion a much broader field than Section 7 is designed to encompass."[10] 360 F.2d at 876-77.

II.

The "reasonable relation" standard adopted by the Fifth Circuit is also out of harmony with the decisions of this Court. In three decisions this Court has been uniform in its emphasis upon minimal interference with the property rights of employers. *Hudgens v. NLRB*, 424

10. In the present case the Administrative Law Judge and, by adoption, the Board relied upon and quoted the Board's decision in *G & W Electric Speciality Co.*, 154 NLRB 1136 (Appendix p. 16a). The Seventh Circuit in that case refused to enforce the Board's interpretation of Section 7. 360 F.2d at 876-77.

U.S. 507 (1976); *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956). *Hudgens* instructs that the "guiding principle" (*Central Hardware, supra*, at 544) established by this Court under the Act is the "accommodation of Section 7 rights and private property rights "with as little destruction of one as is consistent with the maintenance of the other." 424 U.S. at 522. The Fifth Circuit's standard that Section 7 protects anything "reasonably related to the employees' jobs or to their status as employees" will result in the protected distribution of material on a range of subjects wholly remote from wages, hours and terms and conditions of employment. Consequently, the interference with the employer's property rights will be completely out of proportion to the nature and strength of the Section 7 rights to be protected.

The principle of *Babcock* and *Central Hardware* requires a "yielding" of property rights which is *"temporary and minimal"* only after a balancing and accommodation has been made. 407 U.S. at 544. While both *Babcock* and *Central Hardware* involved organizational campaigns, this Court in *Hudgens* held that other union activities (there strike picketing) must also be accommodated to employer property rights in a manner that involves "minimal interference".

The court below has interpreted Section 7 so broadly that any topic in union literature can easily be rationalized into a finding of "reasonable relation" to union or employee interests. Once this "reasonable relation" is found, the literature may be distributed on an employer's property although its relation to the employer is at best attenuated and, in fact, logically remote. The topics which could be addressed under the "reasonable relation" stand-

ard are almost unlimited. Controversies in the political sphere over such issues as common-situs picketing, the Equal Rights Amendment, welfare reform, illegal aliens or amendment of the National Labor Relations Act could all be addressed by union in-plant handouts under the holding of the Fifth Circuit. Since those seeking public or union elective office may well pursue actions which have a "reasonable relation" to the employees' "status or condition", the ruling of the Fifth Circuit would seem to allow union distribution on an employer's property of literature endorsing such candidates. Apart from the inherent danger of disruption and dissension arising from the distribution of handouts addressing controversial topics, especially political ones, the ruling below allowing broad latitude to union or employee distributions goes far afield from the *minimal* interference with private property rights mandated by this Court in *Babcock, Central Hardware* and *Hudgens*.[11]

III.

The issues presented are of universal importance in administration of the National Labor Relations Act. They go to the heart of the basic governing provision of the Act, Section 7. The content of materials which may be distributed by a labor organization within an employer's premises is a question which immediately and directly

11. The standard adopted by the Fifth Circuit in the instant case and the practical effects of the standard establish and extend basically First Amendment parameters to Section 7. Such a view of Section 7 was disapproved by this Court in *Hudgens, supra*. The original decision of the Fifth Circuit reflected this disposition. On Eastex' motion for rehearing, the court below excised all reference to the First Amendment, but did not change the rationale of its original decision. (Appendix, p. 47a).

affects every employer in the country who has or may have a bargaining relationship with a labor organization.

The standard set by the Fifth Circuit, which protects in-plant distribution of material on any subject matter having a "reasonable relation" to employees' jobs or status as employees, has a serious effect upon employer-employee relations. The standard is in actual practice almost meaningless. It is difficult to conceive of a subject which could not be "reasonably related" in light of the Fifth Circuit's application of such "standard" in this case. The Fifth Circuit has, in effect, made a *de facto* application of First Amendment principles to Section 7 while prohibited from doing so *de jure* by *Hudgens*.[12] The result is an overly expansive reading of Section 7, compounded by subjugation of an employer's property rights in favor of the employees' Section 7 rights contrary to the mandate of this Court.

It is plainly in the public interest to reach a definitive decision[13] on this issue which has resulted in conflict among the Circuits and obfuscates and threatens to obliterate private property rights of employers under Section 7.

IV.

The decision of the court below is also erroneous in its failure to recognize and require an *administrative* balancing of employee Section 7 rights and employer private property rights. As noted in the denial of rehearing,

12. See the opinion of the court below. 550 F.2d 198, 204, n. 11 (Appendix p. 38a, n. 11).

13. The Fifth Circuit recognized the need for Supreme Court resolution of this issue. 550 F.2d at 202 (Appendix p. 34a).

"Eastex claims no balancing process was invoked in any of the administrative or judicial decisions in the case".[14] In answering this charge, the Fifth Circuit asserted that "While *we* did not specifically cite *Hudgens*, *we* did recognize and necessarily applied the balancing tests". (Emphasis added) The Fifth Circuit made no attempt to address the omission of the administrative agency, and impliedly admitted the failure of the Board to balance.[15]

It is clear that the duty to balance and accommodate employees' Section 7 rights with the employer's property rights rests with the Board, not the courts. This Court in *Hudgens* recently reiterated this requirement. ". . . In each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance." 424 U.S. at 522. See also *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962); *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-443 (1965); *Securities and Exchange Commission v. Chenery Corp. (I)*, 318 U.S. 80, 90 (1943).

The Administrative Law Judge did not focus upon or make any reference to the Petitioner's property rights. He found only that the two disputed sections of the distributed material were protected by Section 7 and totally ignored Petitioner's property rights. The Board adopted

14. Appendix p. 45a. Petitioner still asserts that the Fifth Circuit failed to conduct a meaningful balancing process.

15. Id. Neither the Board nor the Fifth Circuit considered alternative means of communication available to the union to distribute its polemics. *NLRB v. United Steelworkers*, 357 U.S. 357, 363-64 (1958). It is undisputed that Eastex has always made a mailing list of all employees available to the union, and that the union had previously used the mails for distribution of its political statements. The reason given by the union for its abandonment of mail distribution was the cost.

the ALJ opinion in its entirety, adding nothing. At the least, the ALJ and the Board have failed to "articulate any rational connection between the facts found and the choice made." *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 249 (1972). *Burlington Truck Lines, supra* at 168. *Metropolitan Life Ins. Co., supra* at 443.

Since no balancing process is evidenced in the adminstrative opinion, the Court of Appeals should have remanded the case to the Board for further consideration of the issue of accommodation. *FTC v. Sperry & Hutchinson Co.; Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1940). Instead, the court below asserted that it engaged in the original balancing process, superseding the function of the Board.[16]

The initial accommodation is the function of the Board. The duty of the Circuit Court is to *review* the determination of the Board, not to chart paths as yet untraveled by the Board. *Burlington Truck Lines, supra.*[17] "The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). Here, the Court of Appeals has left the "narrow confines of law" and has entered the "more spacious domain of policy" reserved for the Board. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1940). See also, *South Prairie Construction Co. v. Local 627, Operating Engineers*, 425 U.S. 800 (1976); *NLRB v. Food Store Employees*, 417 U.S. 1, 9 (1974).

16. Decision on motion for rehearing (Appendix p. 46a).

17. "For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review." *Burlington*, 371 U.S. at 169. See also *Securities and Exchange Commission v. Chenery Corp. (II)*, 332 U.S. 194, 196 (1947).

Further, not only has the court below overstepped the bounds of judicial review, but while doing so it has balanced the respective rights of employer and employees erroneously. The holding of the Fifth Circuit that the subject matter of any distributed materials having a "reasonable relation" to the employees or their status or condition is protected is error. If the subject matter does not involve a request for any action on the part of the employer, or does not concern a matter over which the employer has any control, the accommodation process requires the conclusion that distribution on the employer's property is *unprotected*, and outside the parameters of "other mutual aid or protection" of Section 7.

In striking a balance, the Board and *reviewing* Court must weigh the nature and strength of the Section 7 rights involved, if any, and accommodate them with the employer's property rights. *Hudgens, supra.* In this situation, where the subject matter of the distribution involved matters in the economic and political sphere, at best tenuously connected to the employees' jobs or relations with the employer, the balance must be struck in favor, of the employer's rights. To do otherwise renders that balancing and accommodation process an empty gesture. The "balancing" done by the court below does not reflect the "accommodation of Section 7 rights and private property rights with as little destruction of one as is consistent with the maintenance of the other" this Court mandated in *Hudgens, supra,* at 522.

Finally, the effect of the "balance" reached by the court below will be to extend Section 7 protection to practically every conceivable subject unless it is certain to cause disruption. The Fifth Circuit has made an end

run around *Hudgens* and declared the First Amendment and Section 7 protections co-extensive.[18]

18. As noted *supra*, at note 11, the original decision of the Fifth Circuit, before the excision of all First Amendment references, reflects this pre-disposition.

CONCLUSION

The decision of the Fifth Circuit is in conflict with the decisions of four other Circuit Courts. Moreover, the 'reasonable relation" standard adopted by the court below and its interpretation of that standard is out of harmony with decisions of this Court and is erroneous. A definitive resolution of the scope of the "mutual aid or protection" provision of Section 7 of the Act is important to the administration of the National Labor Relations Act. The court below should have remanded the case to the Board for initial "balancing and accommodation' of Section 7 rights and employer property rights. Finally, the court's error in failing to remand was compounded in the improper "balancing" subsequently undertaken. We submit, therefor, that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September, 1977

Appendix

NEWS BULLETIN TO LOCAL 801 MEMBERS
FROM BOYD YOUNG — PRESIDENT

WE NEED YOU

As a member, we need you to help build the Union through your support and understanding. Too often members become disinterested and look upon their Union as being something separate from themselves. Nothing could be further from the truth.

This Union or any Union will only be as good as the members make it. The policies and practices of this Union are made by the membership—*the active membership*. If this Union has ever missed its target it may be because not enough members made their views known where the final decisions are made—The Union Meeting.

It would be impossible to satisfy everyone with the decisions that are made but the active member has the opportunity to bring the majority around to his way of thinking. This is how a democratic organization works and its the best system around.

Through participation you can make your voice felt not only in this Local but throughout the International Union.

A PHONY LABEL — "right to work"

Wages are determined at the bargaining table and the stronger the Union, the better the opportunity for improvements. The "right to work" law is simply an attempt to weaken the strength of Unions. The misleading title of "right to work" cannot guarantee anyone a job. It simply weakens the negotiating power of Unions by out-

lawing provisions in contracts for Union shops, agency shops, and modified Union shops. These laws do not improve wages or working conditions but just protect free riders. Free riders are people who take all the benefits of Unions without paying dues. They ride on the dues that members pay to build an organization to protect their rights and improve their way of life. At this time there is a very well organized and financed attempt to place the "right to work" law in our new state constitution. This drive is supported and financed by big business, namely the National Right-To-Work Committee and the National Chamber of Commerce. If their attempt is successful, it will more than pay for itself by weakening Unions and improving the edge business has at the bargaining table. States that have no "right-to-work" law consistently have higher wages and better working conditions. Texas is well known for its weak laws concerning the working class and the "right-to-work" law would only add insult to injury. If you fail to take action against the "right-to-work" law it may well show up in wages negotiated in the future. I urge every member to write their state congressman and senator in protest of the "right-to-work" law being incorporated into the state constitution. Write your state representative and state senator and let the delegate know how you feel.

POLITICS and INFLATION

The Minimum Wage Bill, HR 7935, was vetoed by President Nixon. The President termed the bill as inflationary. The bill would raise the present $1.60 to $2.00 per hour for most covered workers.

It seems almost unbelievable that the President could term $2.00 per hour as inflationary and at the same

time remain silent about oil companies profits ranging from 56% to 280%.

It also seems disturbing, that after the price of gasoline has increased to over 50 cents a gallon, that the fuel crisis is beginning to disappear. If the price of gasoline ever reaches 70 cents a gallon you probably couldn't find a closed filling station or empty pump in the Northern Hemisphere.

Congress is now preceeding with a second minimum wage bill that hopefully the President will sign into law. At $1.60 per hour you could work 40 hours a week, 52 weeks a year and never earn enough money to support a family.

As working men and women we must defeat our enemies and elect our friends. If you haven't registered to vote, please do so today.

FOOD FOR THOUGHT

In Union there is strength, justice, and moderation;

In disunion, nothing but an alternating humility and insolence.

COMING TOGETHER WAS A BEGINNING
STAYING TOGETHER IS PROGRESS

WORKING TOGETHER MEANS SUCCESS

THE PERSON WHO STANDS NEUTRAL,
STANDS FOR NOTHING!

JD-(SF)-154-74
Silsbee, Texas

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

EASTEX INCORPORATED
and Case No. 23-CA-5085
UNITED PAPERWORKERS INTERNATIONAL
UNION, LOCAL 801

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for the Respondent.

Boyd Young, Union Representative,
of Evadale, Texas, for the
Charging Party.

DECISION

I. Statement of the Case

RICHARD J. BOYCE, Administrative Law Judge: This case was tried before me in Beaumont, Texas, on July 23, 1974. The charge was filed May 2, 1974, and amended June 4, by United Paperworkers International Union, Local 801 (herein called the Union). The com-

plaint issued June 4, 1974, was amended at the trial, and alleges that Eastex Incorporated (herein called Respondent) has violated Section 8(a)(1) of the National Labor Relations Act. Post-trial briefs were filed for the General Counsel and Respondent.

II. Issues

The issues are whether Respondent:

1. At all relevant times maintained no-solicitation and no-posting rules violative of Section 8(a)(1).[1]

2. By prohibiting distribution of a union-sponsored circular on company premises in March-April 1974, violated Section 8(a)(1).

III. Jurisdiction

Respondent is a Texas corporation headquartered in Silsbee, Texas, where it is engaged in the manufacture of paper products. It annually purchases and causes to be shipped into Texas directly from outside the state goods and materials of a value exceeding $50,000.

Respondent is an employer engaged in and affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

IV. Labor Organization

The Union is a labor organization within the meaning of Section 2(5) of the Act.

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1. Counsel for the General Counsel makes no reference in his brief to the no-posting rule alleged in the complaint to be unlawful. There being no express abandonment of that allegation, this decision assumes it still to be in the case.

V. The Alleged Unfair Labor Practices

A. The No-Solicitation and No-Posting Rules

1. The Evidence

Respondent and the Union have had a bargaining relationship concerning Respondent's production employees since 1954. The unit consists of about 800 people. The latest bargaining agreement, in effect at all relevant times until its expiration August 1, 1974, contained these provisions:[2]

> Plant Rule 14:
>
> No peddling or soliciting shall be allowed on the premises without permission of the Production Manager. Petitions which are approved by both Management and the Union will be considered for payroll deductions on an individual basis.
>
> Plant Rule 15:
>
> Notices shall not be posted anywhere in the mill except on company designated bulletin boards which are provided for either general notices or union notices. Approval for posting any notice, except union notices designating time and place of union meetings, must be obtained from Management. All boards must be kept neat and orderly.

The same rules, with slight, nonsubstantive variations in language appeared in all earlier agreements between Respondent and the Union. The General Counsel contends that their maintenance by Respondent violated Section 8(a)(1).

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2. It is unknown if a successor agreement has been negotiated; or, if so, it contains these provisions.

Rule 14, according to the uncontroverted testimony of Respondent's personnel director, Leonard Menius, has never been applied "to prevent the Union from soliciting people for union membership or from attempting to collect union dues, assessments, or any other amounts of money due to the Union." Menius continued that the rule is intended to control "people wanting to sell things or peddle things on the premises," not union solicitations. Apart from whatever inference might be drawn from this statement of Rule 14's intent, the record is silent whether it contemplates or ever has been invoked regarding solicitations unrelated to the Union but still protected by Section 7 of the Act. Nor is there evidence that Respondent ever communicated to the employees that union solicitations are exempt from the rule's prohibition; or evidence of overriding considerations of production or employee discipline to be served by the rule, however applied.

Except that which can be divined from its terms, there is no evidence of the purpose and application of Rule 15.

2. Analysis

Plant Rule 14. Rule 14 prohibits "soliciting . . . on the premises without permission of the Production Manager." Application of the rule is not limited by its terms to working time, for "working time" as that notion is used in the context of no-solicitation rules does not connote all time on company premises, only "the period of time that is spent in the performance of actual job duties";[3] nor do its terms exempt solicitations coming within the scope of Section 7 of the Act. Indeed, a fair reading of

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3. *Essex International, Inc.*, 211 NLRB No. 112, slip op. 4.

the rule suggests a contrary, all-inclusive purport on both counts. It follows that the rule is presumptively improper. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615. See also *Hyland Machine Co.*, 210 NLRB No. 148; *WIPO, Inc.*, 199 NLRB No. 11; *Gooch Packing, Inc.*, 187 NLRB 351; *General Industries Electronics Co.*, 138 NLRB 1371.

The question becomes, then, whether there is evidence overcoming the rule's presumed illegality. There is no evidence that it is necessary to production or employee discipline, so that defense is out. *Stoddard-Quirk Mfg. Co., supra*, at 138 NLRB 621-22. It is no defense, moreover, that the Union agreed to Rule 14 by consenting to its incorporation in bargaining agreements. A union cannot waive the Section 7 solicitation rights of the employees it represents. *N.L.R.B. v. Magnavox Co.*, 85 LRRM 2475 (S. Ct. 1974).

That leaves Respondent's principal line of defense; namely, Menius's disclaimer that the rule was meant to apply to union solicitations, coupled with an absence of evidence that it has been invoked for that purpose.[4] In answer to that defense, there is no evidence that such an exemption ever was communicated to the employees; and no evidence that such an exemption covers all manner of Section 7 solicitations, not just those which are literally "union." Even resolving the latter imponderable favorably to Respondent, we still have a presumptively unlawful rule which, unknown to the employees, is not enforced in an unlawful manner. Nonenforcement does not overcome the adverse presumption. As the Board stated in *A & P Tea Co.*, 162 NLRB 1182, 1184:

4. Respondent's refusal to permit distribution of the union circular, discussed below, was not grounded on Rule 14.

> [W]e reject the Respondent's argument that the rule could have had no coercive effect since it was not enforced. It is well established that the mere existence of an unlawful no-solicitation rule makes it susceptible to application to employees and this factor alone tends to coerce, restrain, and interfere with their right to engage in self-organizational activities.

See also *Leece-Neville Co.*, 159 NLRB 293, 298.

It must be concluded, therefore, that Rule 14 is in violation of Section 8(a)(1).[5]

Plant Rule 15. While Section 7 is read to bestow upon employees the right to solicit or distribue literature on company premises in certain circumstances, it does not bestow upon them a right to use company bulletin boards or other plant surfaces for the posting of information. *Nugent Service, Inc.*, 207 NLRB No. 14, slip op. (JD) 9. The inclusion in the labor agreement of Rule 15, concerning limited use of company bulletin boards, therefore did not constitute an invalid union waiver of a statutory right within the principle of *N.L.R.B. v. Magnovox Co., supra*, but rather an extraction through the bargaining process of a concession Respondent lawfully could have withheld. That being so, there being nothing on the fact of Rule 15 indicative of illegality,[6] and there being no evidence of an improper application of the rule, it is concluded that Rule 15 does not violate the Act.

5. *Mallory Plastics Co.*, 149 NLRB 1649, cited by Respondent urging a contrary conclusion, not only is factually distinguishable from the present case in certain respects, but is of doubtful current validity in light of intervening Board decisions.

6. The requirement in Rule 15 that most notices must be approved by management does not by itself invalidate the rule. *Cf. Gooch Packing, Inc.*, 187 NLRB 351.

B. The Prohibition Against Distributing the Union's Circular

1. The Evidence

In March 1974, the Union's president, Boyd Young, and its executive board decided to distribute this circular among Respondent's employees:

NEWS BULLETIN TO LOCAL 801 MEMBERS
FROM BOYD YOUNG — PRESIDENT

WE NEED YOU

As a member, we need you to help build the Union through your support and understanding. Too often members become disinterested and look upon their Union as being something separate from themselves. Nothing could be further from the truth.

This Union or any Union will only be as good as the members make it. The policies and practices of this Union are made by the membership—*the active membership*. If this Union has ever missed its target it may be because not enough members made their views known where the final decisions are made—The Union Meeting.

It would be impossible to satisfy everyone with the decisions that are made but the active member has the opportunity to bring the majority around to his way of thinking. This is how a democratic organization works and it's the best system around.

Through participation you can make your voice felt not only in this Local but throughout the International Union.

A PHONY LABEL — "right to work"

Wages are determined at the bargaining table and the stronger the Union, the better the opportunity for improvements. The "right-to-work" law is simply an attempt to weaken the strength of Unions. The misleading title of "right-to-work" cannot guarantee anyone a job. It simply weakens the negotiating power of Unions by outlawing provisions in contracts for Union shops. These laws do not improve wages or working conditions but just protect free riders. Free riders are people who take all the benefits of Unions without paying dues. They ride on the dues that members pay to build an organization to protect their rights and improve their way of life. At this time there is a very well organized and financed attempt to place the "right-to-work" law in our new state constitution. This drive is supported and financed by big business, namely the National Right-To-Work Committee and the National Chamber of Commerce. If their attempt is successful, it will more than pay for itself by weakening Unions and improving the edge business has at the bargaining table. States that have no "right-to-work" law consistently have higher wages and better working conditions. Texas is well known for its weak laws concerning the working class and the "right-to-work" law would only add insult to injury. If you fail to take action against the "right-to-work" law it may well show up in wages negotiated in the future. I urge every member to write their state congressman and senator in protest of the "right-to-work" law being incorporated into the state constitution. Write your state representative and state senator and let the delegate know how you feel.

POLITICS and INFLATION

The Minimum Wage Bill, HR 7935, was vetoed by President Nixon. The President termed the bill as inflationary. The bill would raise the present $1.60 to $2.00 per hour for most covered workers.

It seems almost unbelievable that the President could term $2.00 per hour as inflationary and at the same time remain silent about oil companies profits ranging from 56% to 280%.

It also seems disturbing, that after the price of gasoline has increased to over 50 cents a gallon, that the fuel crisis is beginning to disappear. If the price of gasoline ever reaches 70 cents a gallon you probably couldn't find a closed filling station or empty pump in the Northern Hemisphere.

Congress is now proceeding with a second minimum wage bill that hopefully the President will sign into law. At $1.60 per hour you could work 40 hours a week, 52 weeks a year and never earn enough money to support a family.

As working men and women we must defeat our enemies and elect our friends. If you haven't registered to vote, please do so today.

FOOD FOR THOUGHT

In Union there is strength, justice, and moderation:
In disunion, nothing but an alternating humility and insolence.

COMING TOGETHER WAS A BEGINNING

STAYING TOGETHER IS PROGRESS

WORKING TOGETHER MEANS SUCCESS

THE PERSON WHO STANDS NEUTRAL,
STANDS FOR NOTHING!

On about March 26, Hugh Terry, an employee of Respondent and a vice president of the Union, asked Respondent's assistant personnel director, Herbert George, if it would be all right to distribute the circular in "clock alley" at the plant, enabling each employee to get a copy upon clocking in or out.[7] Terry explained that the Union preferred this procedure to mailing because of the high postage rates.[8] George replied that he doubted Respondent would allow the Union to "hand out propaganda like that," but that he would check with "higher management." George presently did check with Leonard Menius, the personnel director, who confirmed that it would not be permitted. George conveyed that message to Terry on about April 1. He did not give Terry any reason for Respondent's position.

On April 22, Union President Young, accompanied by Terry and another employee, raised the matter with George. Young asked if it would be permissible for employees to distribute the circular, on non-working time, anywhere on Respondent's premises—if not in clock alley,

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7. Clock alley is a passageway 6 or 7 feet wide, flanked on either side by administrative offices. In addition to time clocks, the area contains an employee bulletin board and benches and chairs for those waiting to transact business in the offices. Clock alley is physically discrete from the production areas of the plant.

8. The record suggests that the Union's usual past practice was to use the mails when making large-scale distributions, and that Respondent unfailingly provided names and addresses of unit employees for this purpose.

then on an outside walkway or in the parking lot.[9] George initially responded "no", then said he would be glad to "doublecheck" with Menius, which he did. Menius was of the same view, and George informed Young that permission would not be granted. George added, "We feel that you have other ways to communicate with your membership."

Young testified that the Union requested permission for the sake of its "good relationship" with Respondent, not out of any sense that permission was required by the labor agreement or otherwise. The reason for the circular, he testified, was this:

> We were going into negotiations, and . . . we was trying to reorganize our group into a stronger group. We were trying to get members, people that were working there who were nonmembers, and trying to motivate or strengthen the conviction of our members, and it was to organize a little.

Respondent concedes there was no requirement in the labor agreement that permisson be obtained, expressly disavowing the applicability of Plant Rule 14 to the situation. Menius testified that he would not have withheld consent, in clock alley or elsewhere, had the circular been confined to the material under the "We Need You" and "Food for Thought" captions. He objected to the balance of the document, however, testifying, "I didn't

9. George testified: "It was testified here earlier today that a request was made for employees to pass it out. I did not get that impression. My impression was that Boyd Young, himself, wanted to pass out the material, for whatever that is worth." George's "impression" notwithstanding, Young is credited that his request was couched in terms of employees. Young himself is a longtime employee of Respondent, on leave of absence to serve as union president.

see any way in which that was related to our association with the Union."[10]

In times past, Respondent has distributed literature concerning its periodic safety contests from a table in clock alley. The record also tells of instances when politicians and an auto dealer distributed literature on the premises, but Menius insists that Respondent never approved of those activities and stopped them upon detection. In addition, Respondent's supervisors have solicited in the plant in furtherance of charity (United Appeals) and bond (U.S. Savings) drives, and a campaign protesting the expansion of Big Thicket National Park. This apparently consisted of seeking signatures on pledge cards or petitions; there is no evidence that literature was distributed. Finally, information is posted on a bulletin board in clock alley telling the employees how to participate in the Time-Life Books program at a reduced rate.[11]

2. Analysis[12]

The Board stated in *McDonnell Douglas Corporation*, 210 NLRB No. 29, slip op. 1:

10. Further to this point, Respondent notes that, while the commentary in the circular under "Politics and Inflation" deplores the presidential veto of a bill raising the federal minimum hourly wage to $2.00, the lowest hourly wage among Respondent's employees is $3.68.

11. Respondent is a wholly-owned subsidiary of Time, Incorporated.

12. Although most of the cases cited by Respondent on this issue are not mentioned in this decision, they have been considered. If not distinguishable from the present case in their fundamental facts, they embody circuit court repudiations of Board law. Board law, not that of the circuits, is binding in this proceeding. E.g., *Bricklayers Local No. 1*, 209 NLRB No. 123, f.n. 1.

> As in any case which concerns an employer's restraint of employees' efforts to distribute literature upon their employer's plant premises, the first question we must answer is whether the distribution is pertinent to a matter which is encompassed by Section 7 of the Act.

If that pertinence does not exist, there are no restraints in the Act on the employer's power to ban distribution.

Menius, although having no objection to distribution of two sections of the Union's circular, prohibited distribution because he "didn't see any way in which that [the other two sections] was related to our association with the Union." That articulation is not the true test of the requisite Section 7 tie-in. Rather, to quote from *G & W Electric Specialty Co.*, 154 NLRB 1136, 1137-38:

> [T]he protection afforded by Section 7 is not strictly confined to activities which are immediately related to the employment relationship or working conditions. . . . [A]lthough the mandatory subjects of collective bargaining designated in Sections 8(d) and 9(a) relate only to working conditions and the employment relationship, Section 7 provides that employees shall have the right, *inter alia*, to engage in "concerted activities for the purpose of collective bargaining *or other mutual aid or protection.*" [Emphasis supplied.] To construe this provision as protecting only activities directly and immediately involving the employment relationship would therefore be to read the phrase "or other mutual aid or protection" out of the Act.

Illustrative of the reach of this reasoning, the Board found unlawful an employer's ban against on-premises

implementation by its employees of their union's plan to collect money for grape workers attempting to organize in Delano, California (*General Electric Co.*, 169 NLRB 1101); a circuit court found unlawful the discharge of a union president/employee for promoting an employee resolution condemning the employer's posture relative to a strike of another employer's employees [*NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503 (2d Cir. 1942)]; and another circuit court noted that "mutual aid or protection" in Section 7 includes the "appearance of employee representatives before legislative committees." *Bethlehem Shipbuilding Corp. v. N.L.R.B.*, 114 F.2d 930, 937 (1st Cir. 1940).

Looking at the two sections of the Union's circular on which Menius based Respondent's refusal, one dealt with Texas' so-called right-to-work law, commenting among other things:

> The "right-to-work" law is simply an attempt to weaken the strength of Unions. . . . It simply weakens the negotiating power of Unions. . . . If you fail to take action against the "right-to-work" law it may well show up in wages negotiated in the future. I urge every member to write their state congressman and senator in protest of the "right-to-work" law being incorporated into the state constitution.

Union security being central to the union concept of strength through solidarity, and being moreover a mandatory subject of bargaining in other than right-to-work states, it is plain that this commentary is "pertinent to a matter which is encompassed by Section 7 of the Act" as the Board and courts see it. *Bethlehem Shipbuilding Corp. v. N.L.R.B., supra,* indicates that this conclusion is in

no way negated by the circular's advocacy of political means to the desired end.

The other section on which Menius's refusal was based, dealing with the federal minimum wage law and inflation and urging the election of legislators favorable to a higher minimum wage, also is pertinent in terms of Section 7, even though Respondent's employees receive well over the sought-after minimum wage. The minimum wage inevitably influences wage levels derived from collective bargaining, even those far above the minimum. Beyond that, as the Board observed in *General Electric Co., supra,* at 169 NLRB 1103, concern by Respondent's employees for the plight of other employees "might gain support for them at some future time when they might have a dispute with their employer."

So it is that the sections of the Union's circular cited by Respondent to support its refusal were entitled to those distribution privileges the Act allows, no less than the circular's other portions. But even if they were not, even if Respondent were correct that only portions of the circular bore Section 7 pertinence, Respondent would not thereby have been justified in denying its distribution. Thus, in *Samsonite Corp.*, 206 NLRB No. 91, the Board adopted the decision of Administrative Law Judge Taplitz containing this statement at slip op. (JD) 8:

> The fact that some of the articles in the newsletter contained gratuitous remarks or "social comment" matters does not detract from the conclusion that the distribution . . . was a concerted activity [protected by Section 7].

It being established that the Union's circular was entitled to those distribution privileges allowed by the Act,

the question remains whether Respondent, by banning distribution by employees anywhere on its premises, impinged upon those privileges in violation of Section 8(a)(1). The Board, recognizing inherent differences between solicitations and distributions, permits greater restrictions on Section 7 distributions than solicitations. While a no-solicitation rule generally must be limited to working time, a no-distribution rule properly can extend to working areas even on nonworking time. A no-distribution rule that obtains on nonworking times in nonworking areas, however, is presumptively invalid. Seen generally *Stoddard-Quirk Mfg. Co.,* 138 NLRB 615.

As previously noted, the term "working time" for this purpose "connotes the period of time that is spent in the performance of actual job duties, which would not include [for instance] time allotted for lunch and break periods." *Essex International, Inc.,* 211 NLRB No. 112, slip op. 4. The term "working areas" embraces only those portions of a plant where production tasks actually are performed, and does not include separate time-clock areas (*Massey-Ferguson, Inc.,* 211 NLRB No. 64, slip op. 3-4), much less parking lots and other areas outside the plant.

It is clear, notwithstanding the greater latitude given no-distribution rules, that Respondent's refusal to permit distribution of the Union's circular anywhere on the premises—in clock alley, the outer walkway, or the parking lot—went beyond working time and working areas, and so violated Section 8(a)(1) absent special circumstances. Of the latter, there is neither argument nor proof.[13]

13. "Accordingly," as the Supreme Court said in *N.L.R.B. v.*

VI. Conclusions of Law

A. By maintaining a plant rule/contract provision which prohibits employees from soliciting during nonworking time concerning matters relating to the exercise of their Section 7 rights, Respondent has violated Section 8(a)(1) of the Act.

B. By prohibiting employees from distributing literature on nonworking time in nonworking areas concerning matters relating to the exercise of their Section 7 rights, Respondent has violated Section 8(a)(1) of the Act.

C. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

D. Respondent did not otherwise violate the Act in the manner alleged.

Upon the foregoing findings of fact, conclusions of law, and the entire record,[14] and pursuant to Section 10(c)

Magnavox Co., supra, at 85 LRRM 2476, "this is not the occasion to balance the availability of alternative channels of communications against a legitimate employer business justification for barring or limiting inplant communications."

In concluding that the prohibition against distributing the Union's circular violated the Act, it is deemed unnecessary to consider the the charity and bond drives, the campaign concerning Big Thicket National Park, Time-Life Books, and the distributions from clock alley about Respondent's safety contests. Disparate treatment is relevant only in the case of a colorably lawful no-distribution rule, or to show that an employer's stated justifications for a presumptively invalid rule are pretextuous. Further, the charity and bond drives, the Big Thicket campaign, and Time-Life Books were more akin to solicitations than distributions, so would not show disparate treatment in any event. Cf. *Stoddard-Quirk Mfg. Co.*, supra, at 138 NLRB 620 f.n. 6.

14. The word "solicited" on transcript page 37, line 15, hereby is corrected to read "soliciting."

of the Act, I hereby issue the following recommended:[15]

ORDER

Respondent, Eastex Incorporated, its officers, agents, successors, and assigns, shall:

I. Cease and desist from:

A. Maintaining a plant rule or contract provision which prohibits employees from soliciting during nonworking time concerning matters relating to the exercise of their Section 7 rights.

B. Prohibiting employees from distributing literature on nonworking time in nonworking areas concerning matters relating to the exercise of their Section 7 rights.
II. Take the following affirmative action to effectuate the policies of the Act:

A. Post at its plant copies of the attached notice marked "Appendix."[16] Copies of said notice, on forms provided by the Regional Director for Region 23, after being duly signed by an authorized representative of Re-

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15. All outstanding motions inconsistent with this recommended Order hereby are denied. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

16. In the event the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

spondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

B. Notify the Regional Director for Region 23, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

That portion of the complaint found without merit is dismissed.

Dated: September 5, 1974.

/s/ RICHARD J. BOYCE
Richard J. Boyce
Administrative Law Judge

APPENDIX JD-(SF)-154-74

FORM NLRB-4727 (3-69)

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

The trial held in Beaumont, Texas, on July 23, 1974, in which we participated and had a chance to give evidence, resulted in a decision that we had committed certain unfair labor practices in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, and this notice is posted pursuant to that decision.

Section 7 of the National Labor Relations Act, as amended, gives all employees the following rights:

To organize themselves
To form, join, or support unions
To bargain as a group through a representative they choose
To act together for collective bargaining or other mutual aid or protection
To refrain from any or all such activities

In recognition to these rights, we hereby notiby our employees that:

WE WILL NOT maintain a plant rule or contract provision which prohibits employees from soliciting during nonworking time concerning matters relating to the exercise of their Section 7 rights.

WE WILL NOT prohibit employees from distributing literature on nonworking time in nonworking areas concerning matters relating to the exercise of their Section 7 rights.

EASTEX INCORPORATED
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Region 23, One Allen Center, Suite 920, 500 Dallas Avenue, Houston, Texas, 77002 - Telephone Number (713) 226-4271

MFP

215 NLRB No. 58

D--9432

Silsbee, Tex.

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 23—CA—5085

EASTEX INCORPORATED

and

UNITED PAPERWORKERS INTERNATIONAL
UNION, LOCAL 801

DECISION AND ORDER

On September 5, 1974, Administrative Law Judge Richard J. Boyce issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, Eastex Incorporated, Silsbee, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C.

December 4, 1974.

Edward B. Miller, Chairman
John H. Fanning, Member
John A. Penello, Member
National Labor Relations Board

(SEAL)

EASTEX, INCORPORATED,
Petitioner-Cross Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent-Cross Petitioner.

No. 74-4156.

UNITED STATES COURT OF APPEALS,

Fifth Circuit.

April 7, 1977.

On petition for review and cross application for enforcement of an order of the National Labor Relations Board, the Court of Appeals, Brown, Chief Judge, held that whatever is reasonably related to employee's jobs or to their status or condition as employees in the plant may be the subject of union handouts, distributed on plant premises in such manner as not to interfere with work, to the full range permitted by the National Labor Relations Act's language, valid local laws, and the First Amendment; and that both disputed parts of union-sponsored circular, the part dealing with "right-to-work" laws and the effort of "big business" to place such a law in the Texas Constitution, and the part pertaining to politics and inflation and specifically to a national minimum wage law, were sufficiently related to employment situations to merit protection under the National Labor Relations Act.

Enforcement granted.

On Petition for Review and Cross-Application for Enforcement of an Order of The National Labor Relations Board (Texas case).

Before BROWN, Chief Judge, and RIVES and GEE, Circuit Judges.

JOHN R. BROWN, Chief Judge:

This case is before the Court upon the petition of Eastex, Incorporated for review and modification of the Board's determination that Eastex violated § 8(a)(1) of the Act, 29 U.S.C.A. § 158(a)(1)[1] by prohibiting distribution by employees on company premises a union sponsored circular on non-working time in non-working areas. The Board has filed a cross-application for enforcement of the order. We enforce the order.

It is startling, and at the same time a tribute to our adversary system which takes cases as they come with no arrogant assumption that decision makers—legislative or judicial—can anticipate all that will follow, that in the hundreds of Labor Board cases in this Court, we have never been faced with quite this problem before. Avoiding the time worn, battle weary cliche of the clean slate, we are, in the Astronautical Age, exploring new space, with only limited or hierarchical limitations imposed.

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1. Section 8(a)(1), 29 U.S.C.A. § 158(a)(1) provides in pertinent part: (a) it shall be an unfair labor practice for an employer—
(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 157 [Section 7] of this title.
Section 7, 29 U.S.C.A. § 157 provides:
"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. * * *"

I.

In March 1974, the President and Executive Board of the Union (United Paper Workers International Union, Local 801) decided to distribute the following news bulletin to employees of Eastex.

[1] *WE NEED YOU*[2]

As a member, we need you to help build the Union through your support and understanding. Too often members become disinterested and look upon their Union as being something separate from themselves. Nothing could be further from the truth.

This Union or any Union will only be as good as the members make it. The policies and practices of this Union are made by the membership—*the active membership*. If this Union has ever missed its target it may be because not enough members made their views known where the final decisions are made—The Union Meeting.

It would be impossible to satisfy everyone with the decisions that are made but the active member has the opportunity to bring the majority around to his way of thinking. This is how a democratic organization works and it's the best system around.

Through participation you can make your voice felt not only in this Local but throughout the International Union.

[2] *A PHONY LABEL—"right to work"*

Wages are determined at the bargaining table and

2. The brackets [1], etc. are inserted for ease of reference.

the stronger the Union, the better the opportunity for improvements. The "right-to-work" law is simply an attempt to weaken the strength of Unions. The misleading title of "right-to-work" cannot guarantee anyone a job. It simply weakens the negotiating power of Unions by outlawing provisions in contracts for Union shops, agency shops, and modified Union shops. These laws do not improve wages or working conditions but just protect free riders. Free riders are people who take all the benefits of Unions without paying dues. They ride on the dues that members pay to build an organization to protect their rights and improve their way of life. At this time there is a very well organized and financed attempt to place the "right to work" law in our new state constitution. This drive is supported and financed by big business, namely the National Right-To-Work Committee and the National Chamber of Commerce. If their attempt is successful, it will more than pay for itself by weakening Unions and improving the edge business has at the bargaining table. States that have no "right-to-work" law consistently have higher wages and better working conditions. Texas is well known for its weak laws concerning the working class and the "right-to-work" law would only add insult to injury. If you fail to take action against the "right-to-work" law it may well show up in wages negotiated in the future. I urge every member to write their state congressman and senator in protest of the "right-to-work" law being incorporated into the state constitution. Write your state representative and state senator and let the delegate know how you feel.

[3] *POLITICS and INFLATION*

The Minimum Wage Bill, HR 7935, was vetoed by President Nixon. The President termed the bill as inflationary. The bill would raise the present $1.60 to $2.00 per hour for most covered workers.

It seems almost unbelievable that the President could term $2.00 per hour inflationary and at the same time remain silent about oil companies profits ranging from 56% to 280%.

It also seems disturbing, that after the price of gasoline has increased to over 50 cents a gallon, that the fuel crisis is beginning to disappear. If the price of gasoline ever reaches 70 cents a gallon you probably couldn't find a closed filling station or empty pump in the Northern Hemisphere.

Congress is now proceeding with a second minimum wage bill that hopefully the President will sign into law. At $1.60 per hour you could work 40 hours a week, 52 weeks a year and never earn enough money to support a family.

As working men and women we must defeat our enemies and elect our friends. If you haven't registered to vote, please do so today.

[4] *FOOD FOR THOUGHT*

In Union there is strength, justice, and moderation;
In disunion, nothing but an alternating humility and insolence.

COMING TOGETHER WAS A BEGINNING

STAYING TOGETHER IS PROGRESS

WORKING TOGETHER MEANS SUCCESS

THE PERSON WHO STANDS NEUTRAL, STANDS FOR NOTHING!

On March 26, 1974, Hugh Terry, an Eastex employee and Union vice-president sought permission from George, the assistant personnel director, to hand out the bulletin in non-working areas during non-working time. George's response was that he doubted Eastex would allow the distribution but he would check with higher management. Later, Boyd Young, Union President, and other employees of Eastex raised the matter with George. He again denied permission to distribute the bulletin. Upon consultation with Leonard Menius, Eastex's Personnel Director, George confirmed that Eastex's final position would be to deny permission for distribution of the bulletin.

The Administrative Law Judge found that Eastex maintained no-solicitation and no-posting rules[3] in violation of § 8(a)(1). But it is clear that Rule 14, no-solicitation,

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3. Plant Rule 14:
No peddling or soliciting shall be allowed on the premises without permission of the Production Manager. Petitions which are approved by both Management and the Union will be considered for payroll deductions on an individual basis.
Plant Rule 15:
Notices shall not be posted anywhere in the mill except on company designated bulletin boards which are provided for either general notices or union notices. Approval for posting any notice, except union notices designating time and place of union meetings, must be obtained from Management. All boards must be kept neat and orderly.
Eastex did not before the Board, or here, challenge the ALJ's order as to the rules.

played no part in its decision to prohibit distribution of the bulletin. This conclusion is corroborated by Young's testimony that the request was made not because of a contract or rule but to continue good relationship with Eastex.

Eastex took the position that the second and third sections of the bulletin,[4] "[2] A Phony Label—'Right To Work'" and "[3] Politics and Inflation," were purely political and did not pertain to anything over which it had authority or power to change or control. Eastex thus asserts that these sections were not matters related to the exercise of § 7 rights, 29 U.S.C.A. § 157. The Board found that parts [2] and [3] of the bulletin were protected by § 7 and that Eastex had violated § 8(a)(1) of the Act. We agree that the bulletin was protected by § 7 and inescapably it follows that Eastex violated § 8(a)(1) in prohibiting its distribution.

II.

Section 7, 29 U.S.C.A. § 157, guarantees to employees the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. * * *" Section 8, 29 U.S.C.A. § 158, condemns as an unfair labor practice interference by an employer in the exercise of those rights.

The pivotal point of this decision rests upon the classification of the activity—was the admittedly concerted

4. Menius, Eastex's Personnel Director, did not object to the distribution of part "[1] We Need You," and part "[4] Food For Thought," of the bulletin. Nor does it on appeal.

activity for the purpose of collective bargaining or other mutual aid or protection, or was it completely outside of the protection of § 7. In essence, we must determine if this bulletin concerned matters relating to the exercise of § 7 rights. If the activity was under the protective umbrella of § 7, the employer committed an unfair labor practice by interfering in the exercise of the right. If it was not, the employer's prohibition on distribution would furnish no basis for a finding of unfair labor practice.

[1] Eastex prohibited distribution of the bulletin because parts [2] and [3] were purely political and did not pertain to anything over which "Eastex had the authority or power to change or control." We do not accept Eastex's position. Both parts are sufficiently related to employment situations to merit § 7 protection. Although a number of Circuits in a variety of circumstances unlike those here have nominally declared that the test of whether the activity is protected is whether it pertains to something over which the employer has it within his power or authority to change or control,[5] we think that is too narrow.

5. *See NLRB v. Leslie Metal Arts Co., Inc.*, 6 Cir., 1975, 509 F.2d 811, 813 ("Protected activity must in some fashion involve employees' relations with their employer. * * *"); *Shelly & Anderson Furniture Mfg. Co. v. N.L.R.B.*, 9 Cir., 1974, 497 F.2d 1200 (protected activity must seek a specific remedy for a work-related complaint or grievance); *NLRB v. Tanner Motor Livery, Ltd.*, 9 Cir., 1969, 419 F.2d 216 (the mutual aid clause of § 7 "protects concerted activities which have to do with terms and conditions of employment"); *G & W Electric Specialty Co. v. NLRB*, 7 Cir., 1966, 360 F.2d 873 (when the activity of the employee does not involve a request for any action on the part of the company or does not concern a matter over which the company has any control such action is not within the other mutual aid or protection of 29 U.S.C.A. § 157); *NLRB v. Bretz Fuel Co.*, 4 Cir., 1954, 210 F.2d 392, 396 ("Concerted activity is protected only where such activity is intimately connected with the employees' immediate employment").

The fact is that Courts have not been this stringent in the day to day application to the infinite complexities of industrial-collective bargaining life. The horizon of § 7 rights is not confined to the factory wall or the perimeters of the battlefield *vis-a-vis* employer-employees.[6]

Since authorities among (and within) the circuits are not consistent on the point, and the Supreme Court has not yet spoken definitively, we are compelled to offer another view to march in company along the way toward a synthesis.

The synthesis involves, of course, arriving at an accommodation between two sets of rights broadly hostile to each other. One set comprises the rights of the proprietor-employer arising from his ownership and control of the plant premises. Among these is the right to prescribe what those whom he invites on his property

6. *See Fort Wayne Corrugated Paper Co. v. NLRB,* 7 Cir., 1940, 111 F.2d 869; *accord, Bethlehem Shipbuilding Corp. v. NLRB,* 1 Cir., 1940, 114 F.2d 930, *cert. denied,* 1941, 312 U.S. 710, 61 S.Ct. 448, 85 L.Ed. 1141. In *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.,* 2 Cir., 1942, 130 F.2d 503, cited with approval in *NLRB v. Weingarten, Inc.,* 1975, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 and *Houston Insulation Contractors Assn.,* 1967, 386 U.S. 664, 87 S.Ct. 1278, 18 L.Ed.2d 389, this principle was given a more detailed analysis. *See also NLRB v. General Electric Co.,* 9 Cir., 1969, 411 F.2d 750, *aff'g* 169 N.L.R.B. 1101 (1968) (the Ninth Circuit agreed that the protection of § 7 extends to the collection of funds by union members on their employer's property for the striking employees of another unrelated employer); *Signal Oil & Gas Co. v. NLRB,* 9 Cir., 390 F.2d 338; *NLRB v. J. G. Boswell Co.,* 9 Cir., 1943, 136 F.2d 585. Likewise, making of complaints by employees to appropriate government agencies is among the concerted activities protected by the Act. *NLRB v. Shipbuilding Local 22,* 1968, 391 U.S. 418, 424, 88 S.Ct. 1717, 20 L.Ed.2d 706, 712; *Socony Mobil Oil Co., Inc. v. NLRB,* 2 Cir., 1966, 357 F.2d 662, 664; *Walls Mfg. Co. v. NLRB,* 1963, 116 U.S. App. D.C. 140, 321 F.2d 753, *enf'g* 137 N.L.R.B. 1317 (1962), *cert. denied,* 1963, 375 U.S. 923, 84 S.Ct. 265, 11 L.Ed.2d 166.

shall and shall not do while there. The other set of rights are those granted employees by § 7, rights "to self-organization . . . to bargain collectively . . . and to engage in *other* concerted activities for the purpose of collective bargaining or *other mutual aid or protection.* . . ." 29 U.S.C.A. § 157 (emphasis added).

Whatever the scope of § 7 rights may be when exercised off the employer's property,[7] at the plant gate they enter as a wedge driven in the employer's mass of proprietary ones, and as such, on this terrain they come under especial pressure. Yet it seems clear that they should not be unduly compressed there, since it is only there that the employees assemble in their full capacity as such, with attendant ease of communication with each other and with management, and with confrontation of daily problems, subjection to working conditions and discipline, etc. Again and again, accommodation is called for. What is to be the informing principle upon which reaching it proceeds?

[2, 3] The key to determining what § 7 permits employees to *say* inside the gates of the plant does not lie in restricting the scope of Congress' language employed in § 7[8] or in requiring a tone more deferential and a subject matter more restricted than the First Amendment permits. Instead it lies in consulting the purpose for which the employees are invited inside these gates at all.[9] That

7. Doubtless there limited only by valid general law of the situs and the First Amendment.

8. As does the "employer's control" test noted and disapproved.

9. Such a rule of reason was followed by the Supreme Court in the somewhat different context of *Lloyd Corp. v. Tanner,* 1972, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131, and was presaged by the

purpose is to do just one thing: to work at their jobs in that plant. We hold that whatever is reasonably related to the employees' *jobs* or to their status or condition as employees in the plant may be the subject of such handouts as we treat of here, distributed on the plant premises in such a manner as not to interfere with the work, to the full range permitted by § 7's language, valid local laws and the First Amendment. Instead of the rigid employer control formulation, we think the policies of the Act and a synthesis of what courts have done—not always said—require that we adopt this reasonably job related test.

Showing that determination ought not to be compelled by some rigid formulation of the past,[10] the Ninth Circuit's recent decision in *Kaiser Engineers v. NLRB,* 9 Cir., 1976, 538 F.2d 1379, points the way.

In *Kaiser Engineers v. NLRB, supra,* in enforcing the Board's order that Kaiser Engineers had engaged in unfair labor practices, the Ninth Circuit reasoned that direct control by the company over the matter was not the decisive factor. The finding of unfair labor practice was

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dissent of Mr. Justice White in *Food Employees Local 590 v. Logan Valley Plaza,* 1968, 391 U.S. 308, 337, 88 S.Ct. 1601, 20 L.Ed.2d 603. There in determining public rights to handbill in a shopping center, the Court consulted the purpose for which the public was admitted.

10. In *Shelly & Anderson Furniture Mfg. Co., Inc. v. NLRB* 9 Cir., 1974, 497 F.2d 1200, the Ninth Circuit embraced a commentator to declare that for § 7 protection the activity must satisfy these elements:

> "(1) there must be a work-related complaint or grievance; (2) the concerted activity must further some group interest; (3) a specific remedy or result must be sought through such activity; and (4) the activity should not be unlawful or otherwise improper. 18B Business Organizations, Kheel, Labor Law § 10.02 [3], at 10-21 (1973).

based on Kaiser Engineers' discharge of a civil engineer for having signed and joined with other employees in a joint letter written to United States legislators stating their opposition to a competitor's application to Immigration Authorities for authorization to import foreign engineers. Kaiser contended that the activity was not "for mutual aid or protection within the meaning of § 7" and that "protected activity under § 7 [was] limited to [an] activity taking place within the employer-employee relationship and relating to the terms and conditions of employment". 538 F.2d at 1384. The Court, in rejecting this contention, reasoned:

> It is true, that the activity involved no request for action on the part of the company, did not concern a matter over which the company had direct control, and was outside the strict confines of the employment relationship. It is also true, however, that the members of the Civil Engineering Society had a legitimate concern in national immigration policy insofar as it might affect their job security. *Id.* at 1385.

The Court held that:

> "[C]oncerted activity of employees, lobbying legislators regarding changes in national policy which affect their job security, can be action taken for 'mutual aid or protection' within the meaning of § 7. * * *" *Id.*

III.

Before analyzing the challenged parts [2] and [3] some observations are in order. At the outset—although this rubs both ways—the publication was so neutral as to Eastex that it does not even remotely come close to that

category[11] of non-protected distributions which attacking the very enterprise to which workers owe their jobs malign, ridicule or attack the management's conduct of the employer's business. Next, and very important, the distribution of the pamphlet was not some guided or unguided hope of finding a captive audience for propaganda on contemporary political issues unrelated to the interests of the workers or the union as their statutory bargaining agent. On the contrary, the evidence is uncontradicted and presumably credited by the ALJ that it was done out of direct, tangible employee-union self interest. Negotiations for renewal of the collective bargaining contract were just a few months away. This prospect called for increased support and solidarity on the part of the workers, and to that end recruitment of more members from those who, under Texas right to work laws, did not have to belong to the union.[12]

In this effort which neither employer nor Court can censor, it is at least reasonable for the union to think

11. *See, e. g., NLRB v. Local 1229, IBEW,* 1953, 346 U.S. 464, 74 S.Ct. 172, 98 L.Ed. 195; *Maryland Drydock Co. v. NLRB,* 4 Cir., 1950, 183 F.2d 538.

Although some courts have held that employees are not free to distribute this type of material under the protective shield of § 7, without deciding it, we raise the question: Why should they not, so long as management's proper functions and prerogatives are not interfered with by disobedience or economic pressure? Have not the employees an interest in the prudent conduct of the business (and the consequent preservation of their jobs) sufficient to permit them to *speak* on these matters?

12. Young, the union president stated the reasons for wanting to distribute the pamphlet:

> "We were going into negotiations, and . . . we was trying to reorganize our group into a stronger group. We were trying to get members, people that were working there who were nonmembers, and try to motivate or strengthen the conviction of our members, and it was to organize a little." R. 16.

that accomplishing these goals would be enhanced by showing first a sensitive concern for workers' interests in contemporary social-economic-political problems and, second, a strong stand on such issues.

IV.

On can hardly imagine a matter on which organized labor—for its members as well as for non-members for whom the union owes the obligation of good faith bargaining—has a more direct interest than right-to-work laws. If, for example, as frequently recurs, a movement was then under weigh to repeal existing right-to-work laws no one under any § 7 standard could question the right of the workers to inform their fellows as to the necessity for concern and action. To this Eastex counters that with the law already on the books[13] the appeal to use pressure against a prospective constitutional mandate[14] was too

13. In 1947, the Texas Legislature enacted its original right to work law, codified at Tex. Rev. Civ. Stat. Ann. art. 5207a (1971). In 1955, the following right to work law was enacted:

> Section 1. It is hereby declared to be the public policy of the State of Texas that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization and that in the exercise of such rights all persons shall be free from threats, force, intimidation or coercion.

Tex. Rev. Civ. Stat. Ann. art. 5154g, § 1 (1971).

14. At the time the Union and employees were attempting to distribute the bulletin, the Texas Legislature had created and the voters approved the establishment of a Constitutional Revision Commission and the convening of the 63rd Legislature as a Constitutional Convention to propose a revised Constitution to the voters of Texas. *See* Tex. Const. art. XVII, § 2. The Constitutional Revision Commission held public hearings on the need for constitutional change and reported its findings and recommendations to the 63rd Legislature which later convened as the Constitutional Convention of 1974. Using the recommendations of the Commission as a starting point,

remote. But this again ignores the immediate self interest of workers in Texas—including those in the Texas "open shop" of Eastex. It is one thing to face a statutory scheme which is open to legislative modification or repeal. It is quite another thing to face the prospect that such a scheme will be frozen in a concrete constitutional mandate.

That the suggestion was to appeal to congressmen and senators rather than to members of the constitutional revision convention goes only to the method of exercising the cherished right of petition.

[4] Part [2] appeals to the workers with respect to circumstances that involve the effectiveness of the union as an institution. The workers have a real interest in bringing to bear whatever political pressure they might

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the Convention began the task of revising the state constitution.

The right to work issue was very much alive during the Convention, although it was not a recommendation reported from the Commission. A proposal to place the provision in the state constitution had been submitted to the Convention by its General Provisions Committee. *See* General Provisions Official Comm. Report art. X, Tex. Const'l Convention (1974); Preliminary Proposals of the Tex. Const'l Convention of 1974 art. X, § 22 (April 6, 1974). This provision, which would have been submitted to the voters as a separate proposal, was a "highly-charged emotional" issue on and off the convention floor. The possibility that right to work would achieve constitutional standing invoked the concern and interest of organized labor. The Convention failed to adopt the proposed constitution and thus it was never submitted to the voters. In the opinion of one commentator, "[I]f nobody had ever mentioned right to work . . . the convention would probably have adopted a constitution". See Braden, Citizens' Guide To The Proposed New Texas Constitution 60 (1975). This statement accentuates the degree of controversy generated by this issue.

As an additional historical point, it should be pointed out that the 64th Legislature in 1975, in an effort to salvage the labors of the Commission and the Convention of 1974, avoided the right to work issue. The proposed constitution that was put to the voters on November 4, 1975 did not contain a right to work measure. However, the constitution was rejected.

have in order to affect conditions they perceive to be a threat or, vice versa, in their favor. It was within § 7 protection.

V.

Although a bit more tenuous, we think part [3] "Politics and Inflation", is, likewise, protected. Clearly, a minimum wage law even in a company that has a minimum wage of $3.86[15] has a great deal of bearing, from an economic standpoint, on employment and wage levels. Minimum wage is a recurring item in annual negotiations between unions and employers. The national minimum wage may very well have a direct bearing on skilled labor beyond those covered under the minimum wage act. We need not rely on what we in our non-judicial lives observe in the continuous escalation of wage rates with successful arguments that for each level of employment the minimum has to exceed the federal statutory minimum. For here the Board, adopting ALJ has, in its expertise declared that the "minimum wage inevitably influences wage levels derived from collective bargaining, even those far above the minimum". R. 115.

VI.

[5] Although holding that this literature was protected, we feel compelled to reject outright the Board's second argument. The Board would have us hold that once a protected activity is found then any material that is neutral would be permissible. The material must be reasonably related to employment activities, and the

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15. Boyd Young testified that the minimum wage rate at Eastex as of April 22, 1974 was $3.86 an hour.

presence of some § 7 protected material will not rescue that which is significantly not protected.

[6] We must also reject the Board's argument that the least Eastex could have done was to excise the objectionable portions of the bulletin and permit the distribution of the unobjectionable portion. Requiring this of the employer would inevitably place it in the position of editing the proposals of the union and employees. To allow this would give rise to some very dangerous things. The union could not fully express its views in its own way. The strength of the bargaining process would be seriously diluted. We not only think the employer does not have the duty to edit union material, we also would regard it as an impermissible activity on the part of the employer to undertake such efforts, fraught as they would be with a new charge of §§ 7, 8 violations and a court sanctioned interference with First Amendment rights. *See NLRB v. Magnavox Co.*, Tenn., 1974, 415 U.S. 322, 94 S.Ct. 1099, 39 L.Ed.2d 358.

As Eastex does not here question the Board's order on the distribution-solicitation rules (see note 3, *supra*) we make no comment thereon.

ENFORCEMENT GRANTED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 74-4156

EASTEX INCORPORATED,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

JUDGMENT

Before: BROWN, Chief Judge, and RIVES and GEE, Circuit Judges.

THIS CAUSE came on to be heard upon a petition filed by Eastex Incorporated, Silsbee, Texas, to review an order of the National Labor Relations Board issued against said Petitioners, its officers, agents, successors, and assigns, on December 4, 1974, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on November 11, 1975, and has considered the briefs and transcript of record filed in this cause. On April 7, 1977, the Court issued an Order granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Petitioner, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

Entered: April 29, 1977

EASTEX, INCORPORATED,
Petitioner-Cross Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent-Cross Petitioner.

NO. 74-4156.

UNITED STATES COURT OF APPEALS,
Fifth Circuit.

Aug. 5, 1977.

After it enforced an order of the National Labor Relations Board, relating to distribution of union handouts on plant premises, 550 F.2d 198, the Court of Appeals, on the employer's petition for rehearing and petition for rehearing en banc, held that references in its prior opinion to the First Amendment would be stricken.

Petitions for rehearing denied.

On Petition for Review and Cross-Application for Enforcement of an Order of The National Labor Relations Board (Texas case).

ON PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC

(Opinion April 7, 1977, 5 Cir., 1977, 550 F.2d 198)

Before BROWN, Chief Judge, RIVES and GEE, Circuit Judges.

PER CURIAM:

Petitioner-Cross Respondent, Eastex, Inc. (Eastex) states in its petition for rehearing en banc that our de-

cision enforcing the Board's determination that distribution by employees on company premises of a union sponsored circular on non-working time in non-working areas was protected by § 7 of the Act, 29 U.S.C.A. § 157 is contrary to Supreme Court decisions. Specifically, Eastex asserts that: (1) we "failed to adhere to the standard established by the Supreme Court in *Hudgens v. NLRB*, 1976, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196, that union activities must be accommodated to the employer's property rights in a way that involves minimal interference with those property rights"; (2) the reasonable relationship test that we employed in determining what could be the subject of handouts was erroneous in that it would allow disproportionate and excessive interference with the employer's property rights. We disagree for the following reasons.

In *Hudgens v. NLRB*, the Supreme Court rejected the notion that warehouse employees had a First Amendment right to picket their employer's retail store at a privately owned shopping center. The Court held that under the circumstances of the case, the rights and liabilities of the parties were exclusively dependent upon the National Labor Relations Act. 424 U.S. 521, 96 S.Ct. 1029. Further, the Court pointed out that under the Act, the Board's responsibility, subject to judicial review, was to resolve conflicts between § 7 rights and property rights, and to seek a proper accommodation between the two. *Id.* In attacking the panel decision, Eastex claims no balancing process was invoked in any of the administrative or judicial decisions in the case.

While we did not specifically cite *Hudgens*, we did recognize and necessarily applied the balancing test.

> The synthesis involves, of course, arriving at an accommodation between two sets of rights broadly hostile to each other. One set comprises the rights of the proprietor-employer arising from his ownership and control of the plant premises. Among these is the right to prescribe what those whom he invites on his property shall and shall not do while there. The other set of rights are those granted employees by § 7 . . . . *Eastex, Inc. v. NLRB*, 5 Cir., 1977, 550 F.2d 198, 202.

We were conscious of *Hudgens* and utilized its accommodation principles and balancing test in determining who should prevail. As further evidence of our awareness of the opinion, we recognized that § 7 rights, whatever the scope, when exercised at the employer's gate collide with the employer's proprietary rights and as such come under especial pressure. *Id.* at 203.

The *Hudgens* decision recites that its intention was to clear the confusion wrought by *Lloyd Corp. v. Tanner*, 1972, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131, and its effect on *Amalgamated Food Employees Local 590 v. Logan Valley Plaza*, 1968, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603, as to the applicability of the First Amendment or labor law principles in cases of this kind. Although there was considerable disagreement as to whether *Lloyd Corp.* overruled *Logan Valley*,[1] the majority reasoned the First Amendment did not lend its protection to the circumstances and activity in issue.

1. Writing for the Court, Justice Stewart stated: "the rationale of Logan Valley did not survive . . . the Lloyd case . . . the ultimate holding in Lloyd amounted to a total rejection of the holding in Logan Valley. . . ." 424 U.S. 518, 96 S.Ct. 1036. Although concurring in the decision, Chief Justice Burger and Justice Powell did not agree that *Lloyd Corp.* overruled *Logan Valley*. Justice White concurred in the result but stated *Lloyd Corp.* did not overrule *Logan Valley*, either expressly or implicitly. Justices Brennan and Marshall dissented.

In light of this reasoning, we think it better to delete any reference to the First Amendment contained in our prior opinion. Eastex's petition does not specifically complain of the references. However, it has alerted us to our sentences wherein we speak of the permissible scope of activity as sanctioned by the First Amendment. We therefore delete the italicized portion from the following sentence:

> The key to determining what § 7 permits employees to say inside the gates of the plant does not lie in restricting the scope of Congress' language employed in § 7 *or in requiring a tone more deferential and a subject matter more restricted than the First Amendment permits.* (Citations omitted). 550 F.2d 203.

We also delete the following italicized portion from the sentence in the second paragraph, page 203, of our prior opinion:

> We hold that whatever is reasonably related to the employees' jobs or to their status or condition as employees in the plant may be the subject of such handouts as we treat of here, distributed on the plant premises in such a manner as not to interfere with the work to the full range permitted by § 7's language, [and] valid local laws *and the First Amendment*. 550 F.2d 203.

The First Amendment problem is left for another day and time, if ever.

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, F.R.A.P.; Local Fifth Circuit Rule 12), the Petition for Rehearing En Banc is DENIED.